United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

DOCKET NO. 74-2287
(Related to Docket No. 74-2281)

ORIGINAL

74-2281

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

In the Matter of

HAROLD A. LIPTON and IRVING LEVIN,

Plaintiffs-Appellants,

-against-

ROBERT J. SCHMERTZ,

Defendant-Appellee.

B

P/S

On Appeal from the United States District Court

for the Southern District of New York

APPELLANTS' REPLY BRIEF

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UNITED STATES COURT OF APPEALS
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3

TABLE OF CONTENTS

POINT I

28 U.S.C. SEC. 1963 IS NOT EXCLUSIVE AND DOES NOT PRECLUDE PLENARY SUIT OR FILING AND ENFORCEMENT OF A FOREIGN JUDGMENT UNDER APPLICABLE STATE LAWS

The issue of registrability is fairly raised in the principal briefs.

Whether or not registrable under 28 U.S.C. 1963, appellant claims separate, distinct and cumulative rights to proceed (a) by plenary suit (here or in Massachusetts) or (b) by filing under CPLR Article 54 or (c) by summary judgment under CPLR 3213.

Defendant's Brief (at Pages 16-18) in denying plaintiff these alternatives, urges an interpretation of CPLR 5018(b) which totally ignores the effect of Article 54, the "Uniform Enforcement of Foreign Judgment Act".

Sec. 5401 thereof, expressly includes in the definition of "foreign judgment" any "judgment, decree or order of a court of the United States" as well as sister state judgments. Sec. 5402 provides as follows:

> "Sec. 5402 Filing and status of foreign judgments.
> (a) Filing. A copy of any foreign judgment authenticated in accordance with an Act of Congress, of the statutes of this state may be filed within ninety days of the date of authentication in the office of any county clerk of the state ....."

It is manifestly clear that New York law permits a federal court judgment, rendered in a sister state to be "filed" under Sec. 5402, as well as by registration pursuant to 28 U.S.C. Sec. 5018(b). Appellee cites Knapp v. McFarland 462 F.2d 935 (CA-2) obiter out of context to support his unfounded contention. In Knapp, a judgment in the Southern District was sought to be enforced in New York Supreme Court

under New York CPLR 5018 (b), which permits docketing of federal judgment "rendered or filed within the state." A federal court judgment "rendered within the state" is enforceable under 28 U.S.C. Sec. 1962, and its implementing New York State legislation CPLR 5018(b), which provides that, upon filing, the federal judgment becomes a judgment of the Supreme Court of the State of New York for purposes of enforcement. The defendant in Knapp, in urging invalidity of the execution and levy, sought to impose the requirements of the U.E.F.J.A. Article 54.[1] In brushing this argument aside, Judge Mansfield correctly pointed out that Article 54 was primarily designed for enforcement of sister state judgments and not federal judgments, which were already covered by 28 U.S.C. 1963.

Unlike the case at bar, the Knapp court did not have to decide nor did it have before it, the precise issue as to the enforcement of a federal judgment rendered in a sister state under Article 54.

1/ E.g., Ninety days delay after authentication, notice of filing and thirty day delay before distribution of proceeds of execution.

At Page 940, Judge Mansfield recognized:

> "Furthermore, even if Article 54 were construed as providing an alternate method of enforcement of federal judgments, there is no evidence that it was intended to repeal or modify the procedures authorized by Sec. 5018(b)." (Emphasis added)

It is submitted that since CPLR Sec. 5401 expressly includes "any judgment, decree or order of a court of the United States," and since Sec. 5402 provides for "filing" of such judgments, CPLR Sec. 5018(b) can easily be read to permit docketing of federal judgments rendered in a sister state and "filed" under CPLR Sec. 5402 as well as those registered under 28 U.S.C. 1963. The Weinstein-Korn-Miller Treatise at Paragraph 5018.09 states:

> "It should be noted that CPLR 5402, effective September 1, 1970, provides a simplified procedure for the filing of federal judgments rendered by courts outside of New York State. A judgment creditor is no longer obliged to file a certified copy of the judgment in a United States District Court located within the State as a condition precedent to docketing in New York. The judgment can now be filed initially in the office of any County Clerk of New York State. See §5401.01 et seq.

Thus, the contentions in Pages 16-18 of Appellee's Brief are groundless and CPLR Sec. 5018(b) provides no obstacle to enforcement of a federal judgment rendered outside New York State and "filed" under Sec. 5402. Certainly Sec. 5018(b) is no bar to a plenary suit or motion for summary judgment, in view of the express provisions of CPLR Sec. 5406 reserving these remedies.

POINT II

THIS COURT SHOULD NOT STAY THE PLENARY SUIT BELOW

Defendant's Point III (Page 19) requests a stay from the Second Circuit of the proposed plenary suit in the Southern District.

If this court permits plenary suit as an alternative remedy to registration, defendant may apply for a stay in the District Court upon remand.

The District Court may then conduct hearings, review precedent and make ruling upon such an application, and consistent therewith, impose restrictions upon the judgment debtor with regard to his alienation

of assets or other equitable conditions as may be appropriate in the premises.

It is totally inappropriate for this court incidentally to grant a stay without the benefit of such deliberation below, and thus to give defendant Schmertz the very relief from enforcement denied by the Ninth Circuit but granted by Judge Motley.

POINT III

AN INJUNCTION OF STATE PROCEEDINGS IS NOT "EXPRESSLY AUTHORIZED BY AN ACT OF CONGRESS" OR "NECESSARY IN AID OF (THE COURT'S) JURISDICTION OR TO PROTECT OR EFFECTUATE ITS JUDGMENTS" UNDER 28 U.S.C. SEC. 2283.

If the District Court is in error in holding Sec. 1963 to be an exclusive remedy, the injunction below is no longer necessary to effectuate its judgment.

If plaintiffs are entitled to sue on their judgment or to pursue their state remedies in New York, and Massachusetts, the injunction granted below violates Sec. 2283 (Appellee's Brief Page 10) and should be vacated.

If proceedings are brought elsewhere, defendant may apply for a stay, bond or other relief appropriate in the particular forum. Defendant's predicament arises because a trial jury has found that defendant reneged on an option to repurchase 50% of the Boston Celtics. The jury awarded plaintiffs their choice of $4,200,000.00 or 50% of the Celtics' stock.*

If defendant's assets were in California, plaintiff could satisfy their judgment, with all of the "ruinous financial consequences" claimed by defendant.

Because his assets are dispersed in several states, defendant has been able to secure from the Court below what the California Court has denied - a stay, without a bond.

Since the defendant's assets are outside of California, it is the plaintiffs who have been importuned and obliged to incur the added expenses of additional counsel and have been forced to bring suits in several states. It is plaintiffs, not defendants, who are being harassed, and not satisfied.

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*Plaintiffs cannot be criticized for electing the cash rather than the stock now proffered as security. (Appellee's Brief P.21).

POINT IV

PLAINTIFFS' APPLICATION FOR AN ORDER OF ATTACHMENT IS UNAFFECTED BY THE DECISION IN SUGAR V. CURTIS CIRCULATION COMPANY

On October 17, 1974, a three judge Federal Constitutional Court ruled that subdivision (4)(5) and (8) of CPLR 6201, the New York attachment statute were invalid for failure to give notice or immediate post-seizure hearings on attachments issued for fraudulent acts, under the Supreme Court decisions spawned by Fuentes.

Since plaintiff applied for the attachment in the presence of counsel for defendant, and was denied after hearing, this most recent ruling is not applicable to this case.

CPLR 6201(7) upon which plaintiff relies was not involved in the Sugar decision and Defendant has had the opportunity to be heard before the District Court as well as before this Court.

Accordingly, attachment should be granted in order to permit quasi-in-rem jurisdiction to be established and to prevent further dissipation by the

Defendant of his assets. (Appellant's Appendix Vol.I, 7A, 29A, 30A, and the affidavits of Schmertz 10A and 24A).

CONCLUSION

For the reasons given, the order appealed from should be reversed and the injunction vacated, with directions to reinstate the plenary suit and issue an order of attachment.

Respectfully submitted,

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2 copies Served October 25, 1974, [illegible] PM
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